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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

COALITION FOR CLEAN AIR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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52 pp

QUESTION PRESENTED

Whether, despite Congress's determination that the development of local air pollution control measures under the 1990 Amendments to the Clean Air Act is initially the responsibility of State and local governments, EPA is required to promulgate federal air pollution control plans for major urban areas in California because EPA found in 1988 that California had failed to meet requirements of the pre-1990 Act, even though those requirements were later repealed by the 1990 Amendments and replaced with new requirements that California has not yet had the opportunity to meet.

PARTIES TO THE PROCEEDINGS BELOW

The appellants before the court of appeals in No. 91-55383 were the Coalition for Clean Air and Sierra Club, Inc. The appellant before the court of appeals in No. 91-55386 was the South Coast Air Quality Management District (SCAQMD). The appellees in both cases were the United States Environmental Protection Agency (EPA), William K. Reilly, Administrator, Daniel G. McGovern, Regional Administrator, and David P. Howekamp, Director, Air and Toxics Division, EPA Region IX.

The Southern California Association of Governments intervened in the court of appeals in support of EPA. The Environmental Council of Sacramento and Sierra Club, Inc. participated in the court of appeals as *amici curiae* in support of the appellants.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency (EPA) and William K. Reilly, Administrator, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 971 F.2d 219. The opinion of the district court (App., *infra*, 35a-43a) is reported at 762 F. Supp. 1399.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1992. A petition for rehearing was denied on September 11, 1992. App., *infra*, 44a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, as amended, are reproduced at App., *infra*, 45a-47a.

STATEMENT

1. The Clean Air Act establishes a comprehensive program for controlling and improving the nation's air quality, through a combination of state and federal regulation. The basic allocation of state and federal roles in the present Act was established by the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. Congress charged the Administrator of EPA with developing "national * * * ambient air quality standards" (NAAQS). Section 109(a)(2), 42 U.S.C. 7409(a)(2). Congress then required each State to develop and submit to EPA a state implementation plan (SIP) to achieve and maintain the NAAQS within the State. Section 110(a)(1), 42 U.S.C. 7410(a)(1). The Administrator was required to determine whether each SIP met certain statutory requirements, including the attainment of applicable "primary" NAAQS, "as expeditiously as practicable" but generally not later than three years from the date of approval of the SIP. Section 110(a)(2)(A), 42 U.S.C. 7410(a)(2)(A). If a State failed to submit a SIP, or if the Administrator determined that a SIP failed to meet the Clean Air Act's requirements, the Administrator was required to promulgate a federal implementation plan (FIP) for the State within six (or in some cases eight) months. Section 110(c)(1), 42 U.S.C. 7410(c)(1).

In the early 1970s, EPA established NAAQS for photochemical oxidants (ozone) and carbon monoxide (CO).[1] The Los Angeles area was one of the areas that needed a

[1] See 42 C.F.R. 410.9, 410.8 (1972). EPA changed the chemical designation of the photochemical oxidants standard to ozone in 1979. 40 C.F.R. 50.9 (1980).

SIP to attain those standards. California failed to produce an adequate SIP and, consequently, EPA was required to promulgate a FIP for the area. See generally *City of Santa Rosa* v. *EPA*, 534 F.2d 150, 154 (9th Cir. 1976) (upholding the promulgated FIP). To attain the standards, substantial emission reductions were required. After several attempts to find more palatable solutions, EPA reluctantly issued a FIP that called for, among other things, massive gasoline rationing and drastic transportation control measures. *Ibid.*; see 53 Fed. Reg. 49,494, 49,498 (1988). Public outrage led EPA to withdraw the plan just as Congress was in the midst of efforts to amend the Act. See 41 Fed. Reg. 45,565 (1976).

In response to widespread state failures to produce adequate SIPs and the public uproar over FIPs that EPA had promulgated to address those failures, Congress overhauled the Clean Air Act in 1977. The committee report accompanying the House of Representatives bill to revise the Act recognized that FIPs were a crude tool for remedying state failures under the 1970 Act, and concluded that the wisest course for the new Act was to adopt "an approach that is intended to involve the least possible intrusion into State affairs consistent with the primary task of protecting public health." H.R. Rep. No. 294, 95th Cong., 1st Sess. 288 (1977), *reprinted in* 4 *Legislative History of the Clean Air Act Amendments of 1977*, at 2748, 2755 (1978) [hereinafter *Leg. Hist.*]. The Report stressed the need for States to adopt and implement their own transportation control programs, stating that "as a practical matter, State and local governments are in a better position than EPA to resolve those pollution problems, which involve millions of motor vehicles." *Ibid.*[2]

[2] Similarly, the committee report on the Senate bill to amend the Act (S. 252) recognized the substantive and practical differences between SIPs and FIPs when it stated that the bill had been designed to take into account that "[t]he Federal Government does not have and will not have the resources to do an effective job of

Accordingly, the 1977 Amendments maximized pressure on the States to develop adequate plans. The Amendments created a new concept, "nonattainment areas"—areas where air quality falls short of NAAQS—and required SIPs for such areas to satisfy stringent new requirements set forth in the new Part D of the statute; failure to meet those requirements would result in imposition of draconian economic sanctions on the affected areas. Sections 110(a)(2)(I), 171, 172(b), 176(a), 42 U.S.C. 7410(a)(2)(I), 7501, 7502(b), 7506(a). Congress extended the deadline for attainment of the primary NAAQS in nonattainment areas to December 31, 1982. Section 172(a)(1), 42 U.S.C. 7502(a)(1). Further extensions were permitted for ozone and carbon monoxide, but only if the State demonstrated that attainment was not possible by 1982, despite the implementation of all reasonably available measures, and that attainment would be achieved "as expeditiously as practicable but not later than December 31, 1987." Section 172(a)(2), 42 U.S.C. 7502(a)(2).

2. In 1978, the EPA Administrator designated the South Coast Air Basin in California (comprising most of Los Angeles, San Bernardino, Orange and Riverside Counties) as nonattainment areas for carbon monoxide and ozone. See 43 Fed. Reg. 8962, 8964 (1978). In 1979, California submitted its SIP for the South Coast area; EPA, with limited exceptions, approved that SIP. 47 Fed. Reg. 28,617 (1982). California also requested, and EPA approved, an extension of the statutory attainment date for the South Coast from 1982 to December 31, 1987. See 47 Fed. Reg. 50,864 (1982). As required, the State submitted updated 1982 ozone and CO SIPs for the South Coast area. In 1984, EPA approved parts of the 1982 South Coast plans. 49 Fed. Reg. 30,300 (1984).

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running the air pollution control programs of the States." S. Rep. No. 127, 95th Cong., 1st Sess. 10 (1977), *reprinted in* 3 *Leg. Hist.* 1384.

On November 3, 1987, the Ninth Circuit vacated EPA's 1984 partial approval of the 1982 South Coast SIPs. *Abramowitz* v. *EPA*, 832 F.2d 1071 (9th Cir. 1987). On January 22, 1988, EPA disapproved the 1982 South Coast plans on the ground that, *inter alia*, they failed to demonstrate attainment of the NAAQS by the December 1987 statutory attainment date, as required by Section 172(a) of the Act. See 53 Fed. Reg. 1780 (1988).[3]

In February 1988, two environmental groups brought this case under the citizen suit provision, Section 304 (a)(2) of the Act, 42 U.S.C. 7604(a)(2), to compel EPA to promulgate ozone and carbon monoxide FIPs for the South Coast area pursuant to Section 110(c)(1), 42 U.S.C. 7410(c)(1). In March 1989, EPA entered into a settlement agreement which, after court-approved modifications, obligated EPA to promulgate federal plans in final form by February 28, 1991. The settlement agreement allowed EPA to seek vacation of its FIP obligations if amendments to the Act then pending in Congress obviated the duty to prepare a FIP. EPA issued a proposed FIP in September 1990. 55 Fed. Reg. 36,458 (1990).

3. In the years leading up to 1990, it had become increasingly clear that several areas of the country with severe air pollution problems, including the Los Angeles

[3] While the South Coast has not had a plan demonstrating attainment of the national standards, it has had in place a series of enforceable regulations governing emissions from a wide range of stationary sources. See, *e.g.*, South Coast Air Quality Management District Rules 1175 (foam products), 1153 (commercial bakeries), 1121 (residential water heaters), 1150 (landfills). In addition, the California Air Resources Board has adopted new measures and strengthened existing measures with respect to those sources in order to comply with the requirements of the California Clean Air Act. See, *e.g.*, 57 Fed. Reg. 909 (1992) (proposed waiver of federal preemption for amendments to California's stringent "low-emission vehicle" standards for light and medium-duty vehicles); 56 Fed. Reg. 45,866 (1991) (proposed waiver of preemption for non-road engine and vehicle exhaust emission standards); see generally Cal. Code Regs. tit. 17, §§ 94500-94517 (emission standards for consumer products.).

area, could not possibly meet the ambitious requirements of the 1977 Amendments without extreme economic dislocation. On November 15, 1990, the Clean Air Act Amendments of 1990 were enacted. Pub. L. No. 101-549, 104 Stat. 2422-2423. Among other things, Congress completely revised the Part D nonattainment provisions of the Act. In so doing, Congress repealed the provisions of Section 172 that had required SIPs for the South Coast area to demonstrate attainment by December 31, 1987. Those provisions, of course, had formed the basis for EPA's disapproval of the California SIP submissions, and thus the statutory justification for that disapproval was eliminated by the 1990 Amendments. Congress replaced those provisions with a detailed scheme of new requirements and extended deadlines specifically applicable to ozone and CO nonattainment SIPs. Sections 171-193, 42 U.S.C. 7501-7515.

In particular, the 1990 Amendments established five classifications of ozone nonattainment areas depending on the degree of severity of each area's ozone problem—ranging from "marginal" to "extreme"—and two classifications of CO nonattainment areas. The Amendments also set new, extended deadlines for the attainment of the primary NAAQS for each classification. 42 U.S.C. 7511(a)(1) and 7512(a)(1) (Supp. II 1990). Congress also imposed specific and increasingly rigorous requirements for Part D SIPs, depending on the area's nonattainment classification, with new deadlines, ranging from immediately to six years, for submitting various components of the plans to EPA. 42 U.S.C. 7511a, 7512a (Supp. II 1990).

Among those requirements are provisions that Congress designed exclusively for the Los Angeles area, which is the only area in the country that is classified as "extreme" for ozone.[4] California must submit by November

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[4] See Section 181(a), 42 U.S.C. 7511(a) (Supp. II 1990); 40 C.F.R. 81.300 *et seq.* (1992); 40 C.F.R. 81.305 (1992); 56 Fed. Reg. 56,694, 56,726 (1991).

15, 1994, a demonstration that the South Coast's ozone SIP will achieve attainment by December 31, 2010. 42 U.S.C. 7511a(c)(2) and (e) (Supp. II 1990). A carbon monoxide attainment demonstration for the South Coast must be submitted by November 15, 1992. 42 U.S.C. 7512a(a)(7) and (b)(1) (Supp. II 1990).

In addition, the 1990 Amendments substituted a new version of Section 110(c)(1) for the previous version of that provision. The amended version states that the Administrator "shall promulgate a Federal implementation plan at any time within 2 years after the Administrator * * * disapproves a [SIP] submission in whole or in part." 42 U.S.C. 7410(c)(1)(B) (Supp. II 1990). EPA's FIP obligation also arises where the Administrator finds that a State has failed to make a "required submission" or that the plan or plan revision submitted by a State does not meet the new requirements for plan submissions established under 42 U.S.C. 7410(k)(1)(A). 42 U.S.C. 7410(c)(1)(A) (Supp. II 1990). A State may not, however, pass the planning obligation on to EPA without penalty. If a State fails to make a required submission, or if EPA disapproves a submission, EPA must impose either a cut-off of highway funds or stringent emission reductions on new or modified sources. 42 U.S.C. 7509 (Supp. II 1990).

The new amendments also include a general savings clause stating that "[n]o control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant." 42 U.S.C. 7515 (Supp. II 1990).

4. EPA concluded that the 1990 Amendments' generic savings clause did not preserve its obligation to promulgate FIPs for the South Coast, because the Agency had never agreed to promulgate any specific "control re-

quirements" as part of its agreement to develop FIPs for the area. Moreover, the legislative history of the savings clause indicated that Congress did not intend EPA to finalize FIPs for the Los Angeles area. Additionally, the language of revised Section 110(c)(1) and of the new Part D provisions, which direct States to develop SIPs meeting new requirements and deadlines and to submit the various SIP components to EPA on specific schedules, indicates that EPA's obligation to promulgate FIPs would arise only upon future disapprovals of those newly submitted SIPs. EPA accordingly asked the district court to vacate the settlement agreement.

The district court agreed with EPA. App., *infra*, 35a-43a. The court found the language of Section 110(c) to be ambiguous, and concluded that EPA's construction is consistent with the structure of the revised Act and the "obvious policy that the States are encouraged to take the lead, with the potential FIP to be the stick that drives them." App., *infra*, 38a. Accordingly, the court found EPA's interpretation entitled to substantial deference. The court also found that the language and history of the savings clause support EPA's interpretation.

5. A divided panel of the Ninth Circuit reversed. App., *infra*, 1a-34a. Although the majority recognized that Section 110(c)(1) had been revised in several particulars by the 1990 Amendments, it held that the "plain" language of amended Section 110(c)(1)(B), which requires EPA to promulgate a FIP within two years after it "disapproves" a SIP, applies to pre-Amendment disapprovals. App., *infra*, 12a-13a. Thus, the court ruled that new Section 110(c)(1)(B) operates retroactively to retain EPA's preexisting FIP obligation, even though the statutory provisions forming the basis for that obligation have been repealed. In reaching this conclusion, the court declined to indicate whether the requirements of the old law or the 1990 Amendments would govern the contents of this FIP. App., *infra*, 13a.

The majority recognized that the States have new SIP obligations under the 1990 Amendments, but it reasoned that no "anomaly" would result from requiring EPA to impose a FIP before a State has had an opportunity to address the new criteria, because the State could propose "new measures as revisions to the FIP." App., *infra*, 13a-14a. Thus, the court concluded that interpreting the amended Act to preserve EPA's obligation to promulgate a FIP "will not have the effect of preempting state planning or the new state submissions that are required under the 1990 Amendments." *Id.* at 19a.

Having found the language of Section 110(c)(1) to be unambiguous, the majority refused to defer to EPA's interpretation of the statutory provisions. App., *infra*, 20a. Moreover, the majority indicated that deference would not be due in any event, because the Agency's construction contradicted views stated in a letter from the EPA Administrator to the House of Representatives written six months before the 1990 Amendments were finally enacted. *Id.* at 20a-21a. The majority also declined to give weight to the language and legislative history of the savings clause, 42 U.S.C. 7515. *Id.* at 16a-20a.[5]

Judge Noonan dissented. He pointed out that Section 110(c) has been significantly revised by the 1990 Amendments and that its language is most logically read to refer to future disapprovals of SIPs, not past disapprovals. App., *infra*, 26a-29a. He also stressed that the SIP disapprovals in this case had been based on provisions of the 1970 and 1977 Acts that have been repealed by the 1990 Amendments, and observed that "[i]t would * * * make nonsense of the new law to hold that the old

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[5] This history included a statement by the chairman of the conference committee indicating that "[w]e do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California and preempt the states and regional air quality planning that is ongoing in the Los Angeles area and will otherwise be required under this legislation." 136 Cong. Rec. S16,970 (daily ed. Oct. 27, 1990).

disapproval must continue in effect despite the relaxation of the standards effected by the 1990 changes." App., *infra*, 31a. He also stated that imposing a federal plan at this point, in the absence of any showing of a violation of current requirements, reverses the Act's express preference for granting States the initial role in controlling air pollution. *Id.* at 31a-32a.

REASONS FOR GRANTING THE PETITION

This case presents questions of exceptional practical importance concerning the division of responsibilities between the States and the federal government under the Clean Air Act, the proper interpretation of the Clean Air Act Amendments of 1990, and the proper role of a reviewing court in interpreting important new statutory provisions. The court of appeals' decision reflects a misapplication of this Court's precedents governing statutory construction and deference to agency interpretations. It thereby significantly undermines the federal-state balance embodied in the Act, dramatically alters the manner of implementation Congress has chosen for the new Amendments, and wholly ignores the statutory context in which the Act's air quality goals are to be achieved. As a practical matter, the court of appeals' decision threatens to result in widespread inconvenience and hardship for millions of California citizens and substantial dislocation of California's economy. Those serious consequences, which are contrary both to Congress's express intention and to EPA's reasonable interpretation of the Amendments, should not be visited upon millions of persons without review by this Court of the legal disagreement that has been manifested by the various federal judges who have considered the matter.

The Clean Air Act Amendments of 1990 represent a legislative compromise between Congress's desire for cleaner air and its concern for ensuring future economic growth and well being. In the 1990 Amendments, Con-

gress made a very clear policy choice—to favor state and local planning, followed by federal planning only after the state and local planning is found deficient—and prescribed the precise timing and manner in which air quality standards in each region should be achieved by the responsible state and local authorities. The panel's decision turned that policy choice on its head by misconstruing and ignoring the statutory context of the Act's provisions on state and federal plans. The majority opinion preserves EPA's pre-1990 obligation to promulgate a FIP for the Los Angeles area merely because California's pre-1990 SIPs failed to comply with certain requirements of the pre-1990 Act, requirements that Congress *eliminated* in the 1990 Amendments.[6]

As a result of the lower court's decision, EPA has been made initially and primarily responsible for developing air pollution control strategies for a large part of California, and has been precluded from giving the state and local authorities their rightful opportunity to make the first attempt to assemble the mix of pollution controls they believe are appropriate to achieve the huge emission reductions necessary—an opportunity they would otherwise have under the 1990 Amendments.[7] In distorting

[6] Specifically, California failed to submit a plan showing attainment of the ozone and carbon monoxide standards by 1987, a requirement based on Section 172(a) of the pre-1990 Act. In the 1990 Amendments, Congress deleted this deadline from Section 172(a) and replaced it with new provisions that do not preserve any element of the State's prior failures.

[7] The result here also governs EPA's FIP obligations in two other areas of California as well: Sacramento and Ventura County. In *Environmental Council of Sacramento* v. *EPA*, Civ. No. S-87-420 EJG (E.D. Cal. Dec. 2, 1991), aff'd, No. 92-15293 (9th Cir. July 9, 1992), EPA moved to vacate a settlement agreement requiring it to promulgate an ozone FIP for the Sacramento area. After the district court denied EPA's motion, the parties negotiated a modification to the settlement agreement whereby EPA agreed to publish a proposed FIP within four months of the entry of the mandate

the statutory language and structure to achieve this reversal of the state and federal planning roles under the Act, the court of appeals also misapplied well-established principles concerning statutory construction and deference to agency interpretation. See *Arkansas* v. *Oklahoma*, 112 S. Ct. 1046, 1060-1061 (1992); *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1769 (1991).

The practical consequences of the panel's errors are enormous. The Los Angeles area has the worst air quality in the nation. Any plan to attack and solve the area's "extreme" ozone problem necessarily will have pervasive deleterious impacts on most aspects of that region's economy—an economy that each year produces goods and services valued at more than a quarter of a *trillion* dollars—and on the lives of the thirteen million people living there.[8] The only type of complete regulatory plan that EPA has the means to promulgate and implement in the area would necessarily consist of a limited number of intrusive measures that would indiscriminately force huge cutbacks in emissions from most mobile, stationary, and area sources. As we explain below, extreme measures such as gas rationing and "no drive" days are the types of limited tools with which EPA must work.

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by the Ninth Circuit in the instant case, and a final FIP six months thereafter. EPA appealed the judgment in the *Sacramento* case, and the parties agreed to submit that appeal to the panel which was already considering the instant case. That panel affirmed the *Sacramento* judgment in a brief order dated July 9, 1992, which cited its July 1, 1992 decision in the instant case. Judge Noonan again dissented. We are filing a petition for a writ of certiorari in that case concurrently with the filing of this petition.

Under an agreement in a parallel case involving EPA's obligation in Ventura County, *Citizens to Preserve the Ojai* v. *EPA*, No. CV 88 00982 HLH (C.D. Cal. Mar. 13, 1991), EPA's obligation to promulgate a FIP is also governed by the result here.

[8] In addition, the two million residents and the economies of the Sacramento and Ventura County areas—regions with a combined annual domestic product in excess of 40 billion dollars—will be similarly affected.

By contrast, the state and local authorities have available the authority and resources to formulate, adopt, and implement a much more nuanced plan containing many measures that EPA lacks the authority or the practical ability to implement (such as local land-use planning, public transportation, and traffic control measures). Thus, if EPA is forced to promulgate a FIP before the State has had its chance to produce a SIP satisfying the requirements of the 1990 Amendments, the result will be to require the residents and businesses of the affected areas to take actions that may be either unnecessary under, or even incompatible with, the measures that the state and local authorities will ultimately require. This, in turn, will cause widespread confusion and economic waste for an indeterminate period of time, and is likely to impede attainment of the air-quality goals set by Congress.

This disruption could be avoided entirely if, as the statute requires, the State were given the initial opportunity to formulate its plan under the 1990 Amendments, and EPA were only then called on to produce a FIP if necessary to fill gaps in areas in which the State had failed to satisfy fully its obligations under the Act. Reversing the court of appeals' misconstruction of the statute and avoiding the disruption that would result from the panel's decision are matters of such importance to faithful implementation of the congressional plan that this Court's review is warranted.

1. The majority's ruling conflicts with fundamental principles concerning the proper interpretation of statutory provisions.

a. The critical language here, found in Section 110(c)(1)(B), states that the Administrator "shall promulgate a Federal implementation plan at any time within 2 years after the Administrator * * * *disapproves* a State implementation plan submission in whole or in part." 42 U.S.C. 7410(c)(1)(B) (Supp. II 1990) (emphasis added). The fact that this directive is phrased in

the present tense is strong evidence that Congress did not intend the obligation to apply retroactively to past disapprovals.

The court of appeals nonetheless applied Section 110(c)(1) to EPA's past disapproval of the State's SIP, noting that "[t]he present tense is commonly used to refer to past, present, and future all at the same time." App., *infra*, 11a. Contrary to the majority's approach, however, this Court recently has emphasized that "Congress' use of a verb tense is significant in construing statutes." *United States* v. *Wilson*, 112 S. Ct. 1351, 1354 (1992). See *Gwaltney of Smithfield, Inc.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987). Congress could easily have said "has disapproved" if it had meant pre-Amendment disapprovals to trigger the duty to impose FIPs.

b. EPA's reading of the Act is further reinforced by the fact that the 1990 version of Section 110(c)(1) gives EPA two years (rather than the six or eight months available under the previous version of the provision) in which to develop a FIP. Congress obviously concluded that this additional time was necessary for the complex task of completing a FIP. Yet under the majority's retroactive application of the 1990 Amendments, the two-year period established by the new Section 110(c)(1) began to run when EPA disapproved the State's SIP in 1988. As a result, the two-year period established by Congress in November 1990 ran out in January 1990—ten months before the 1990 Amendments were even enacted. In short, even though Congress clearly intended to *increase* the amount of time available for promulgating FIPs, the majority applied the amended statute retroactively in order to reduce the time for producing a FIP to zero, with the bizarre result that Congress must be deemed to have imposed a statutory deadline on EPA that the Agency had already violated before the deadline even came into existence.

c. There is still another indication in the language of revised Section 110(c)(1) that the obligation to promulgate a FIP was not intended to apply retroactively to pre-1990 SIP disapprovals. The 1990 Amendments substantially rewrote Section 110(c)(1) by adding a new triggering event in Section 110(c)(1)(A): EPA's finding that a submission fails to meet the "minimum criteria" which are to be established by EPA pursuant to new Section 110(k)(1)(A). 42 U.S.C. 7410(c)(1)(A) (Supp. II 1990). "Minimum criteria" did not exist before passage of the 1990 Amendments, and thus an obligation to promulgate a FIP by virtue of a State's failure to meet those criteria could not possibly have come into existence until after enactment of the Amendments. While it is theoretically possible that Congress could have intended that one clause of Section 110(c)(1) would be retroactive in effect while the other clause of that same Section was exclusively forward-looking, one would certainly expect that the language used would reflect that fundamental difference in approach. But subsection 110(c)(1)(B) uses "disapproves" rather than "has disapproved" in reference to the SIP, which rebuts any notion that Congress meant this one clause to look backward to pre-Amendment disapprovals.

2. a. In addition to its failure to adhere to the language and structure of amended Section 110(c)(1) itself, the court of appeals also failed to heed the rule that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital*, 112 S. Ct. 570, 574 (1991) (citations omitted). See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). When the 1990 Amendments are read as a whole, it becomes apparent that Congress plainly intended state and local authorities to be given the first chance to devise SIPs to comply with the requirements of the amended Act.

Congress completely revised the Act's requirements for nonattainment areas such as the South Coast in the 1990

Amendments. Most importantly for purposes of this case, Congress repealed the pre-1990 provision requiring States to attain the Act's ozone and carbon monoxide standards by 1987.[9] Instead, Congress developed a graduated series of requirements for different areas depending on the severity of the air quality problem in each. Because of the unique difficulties in bringing about attainment of air quality standards in the South Coast area, Congress included special provisions that apply to that area alone. As the only "extreme" ozone nonattainment area in the country, the South Coast is the only area that has been given 20 years in which to attain the ozone standard, and the only area permitted to rely in part on anticipated new control technologies to reach attainment. 42 U.S.C. 7511(a)(1), 7511a(e)(5) (Supp. II 1990). At the same time, the 1990 Amendments impose specific new requirements for the South Coast ozone and carbon monoxide SIPs, and impose new deadlines for submitting those plans to EPA. Sections 171-193, 42 U.S.C. 7501-7515 (Supp. II 1990).

This greatly altered legal regime highlights the illogic of the majority's ruling. A FIP is defined by the amended Act as a plan to fill a gap or "correct all or a portion of an *inadequacy* in a State implementation plan." 42 U.S.C. 7602(y) (Supp. II 1990) (emphasis added). California's 1982 SIP for the South Coast area was rejected by EPA in 1988 because it was "inadequa[te]" when measured by the pre-Amendment deadlines, and accordingly EPA had an obligation under the pre-1990 Act to promulgate a FIP in order to correct that "inadequacy." But it stretches the statutory language beyond the breaking point to say that California's compliance with the Act is "inadequa[te]" today in light of the amended stat-

[9] It was California's failure to comply with that now-repealed provision that led to EPA's original rejection of the SIP for the South Coast area and thus to EPA's pre-1990 obligation to promulgate a FIP.

ute, because the State has not even been given a chance to demonstrate its ability to comply with the new deadlines and requirements imposed by the 1990 Amendments and has not yet failed to meet any of those deadlines.

b. In the unlikely event that Congress had wanted the 1990 Amendments to preserve EPA's obligation to prepare a FIP in cases where a SIP had run afoul of the old deadlines, it presumably would have made this intent clear in the general savings clause of the 1990 Amendments, 42 U.S.C. 7515. The language of that clause, however, strongly cuts against any such purported intent. The relevant language preserves only any "control requirement" that was in effect "or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990." Such a control requirement can be modified only if the modification "insures equivalent or greater emission reductions." 42 U.S.C. 7515. While the settlement agreement in this case required EPA to promulgate a FIP on a defined schedule, a FIP is merely a plan, not a "control requirement." [10] If Congress had intended to preserve EPA's obligation to promulgate substitute federal plans, as opposed to "control requirements," it presumably would have said so explicitly in the savings clause.

As the dissent points out (App., *infra*, 33a), the savings clause also preserved all regulations in effect before the date of the Amendments. For this reason, FIPs promulgated in final form before the Amendments were enacted remain in effect. The settlement agreement obligating EPA to promulgate a FIP was not promulgated as a regulation (or a control requirement), however, and

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[10] The second sentence of the savings clause provides that "[n]o control requirement * * * required to be adopted by an order, settlement agreement, or plan in effect" may be modified. 42 U.S.C. 7515. The fact that Congress used the words "control requirement" and "plan" for different purposes within the same sentence of the savings clause is compelling evidence that it intended to give the words different meanings.

hence was not preserved by the savings clause. The majority's insistence (App., *infra*, 14a n.8) that preserving an obligation to prepare a FIP is the same as preserving a promulgated FIP itself ignores the plain language of the savings clause.

c. The majority's conclusion that a FIP is required now, before the State has even had an opportunity to develop the required submissions under the amended Act, violates the express congressional determination that "air pollution prevention" and "air pollution control at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. 7401(a)(3) (Supp. II 1990). This policy statement cannot be dismissed as mere precatory guidance; it goes to the heart of how the Act was intended to work. This policy counsels strongly against any reading of the Act that would require EPA to promulgate a FIP before the State has had an opportunity to determine for itself how best to control pollution under the greatly revised requirements of the 1990 Amendments.

The majority concluded that this strong statement regarding the primacy of state and local efforts was essentially canceled out by the immediately following statement regarding the importance of "Federal financial assistance and leadership." App., *infra*, 15a n.9 (quoting 42 U.S.C. 7401(a)(4)). But that statutory recognition of the federal government's obligation to provide financing and leadership in no way undercuts Congress's fundamental policy decision that the States should have the primary responsibility for air pollution control within their borders. The Act provides for the federal government to take the lead in promulgating certain nationally applicable regulations, such as the motor vehicle and fuels regulations mandated by Title II of the Act. 42 U.S.C. 7521 *et seq.* Beyond that, however, direct federal controls on pollution are the exception rather than the rule. See *Train* v. *NRDC*, 421 U.S. 60, 79 (1975) ("[EPA is]

plainly * * * relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met."); *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 267 (1976) ("[T]he State has virtually absolute power in allocating emission limitations so long as the national standards are met"). While it is undeniable that the federal government has an additional role where a State has failed to produce an adequate SIP, there is no warrant in the statute for continuing federal primacy once Congress amends the statute in a way that essentially moots the State's original failure.

3. Even if we assume, arguendo, that the language and structure of the revised Act were unclear, the proper response would be to defer to EPA's construction, as long as that construction was reasonable. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). The majority rejected the applicability of the *Chevron* rule because, in its view, the statute was clear. App., *infra*, 20a. But Congress's use of the present tense in the critical phrase of the statute, combined with the repeal of the provisions that had formed the basis for EPA's prior state plan disapprovals, indicates that Congress was referring to future disapprovals under the amended Act, not to prior disapprovals under the pre-1990 Act. At the very least, this is not a question that admits of only one reasonable answer. See *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1016 (1992) (a statute is not "unambiguous" if its language admits of two plausible readings).

Judicial deference to reasonable agency interpretations of statutes they administer is a "well settled principle of federal law." *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. at 1401. Despite the

fact that EPA's construction is consistent with the language, history, and structure of the 1990 Amendments, the court of appeals refused to defer to that construction because the Agency had allegedly offered a contradictory interpretation in the past. App., *infra*, 20a. The court cited a letter written by the EPA Administrator six months before passage of the amendments in which he criticized the House version of the statute for generally retaining the FIP requirement as a nondiscretionary duty. The letter stated that the House version would thereby preserve "current FIP obligations." See App., *infra*, 19a (quoting 136 Cong. Rec. H2771, H2887 (daily ed. May 23, 1990)). This statement, made as the dissent points out "in the course of legislative bargaining" (App., *infra*, 24a), should not be taken as EPA's contemporaneous interpretation of the Act itself.

Almost immediately after enactment of the 1990 Amendments, EPA set forth its official interpretation of Section 110(c)(1), based on a reading of the entire statute (including the savings clause). 56 Fed. Reg. 826 (1991). In that notice, EPA stated its formal interpretation that FIP obligations based on pre-1990 SIP disapprovals did *not* survive the Amendments. This, rather than a letter written during the early stages of the legislative debate, constitutes the contemporaneous agency interpretation of the Amendments. See *Russello* v. *United States*, 464 U.S. 16, 29 (1983). The majority's refusal to give any deference to that agency interpretation was error. See *Rust* v. *Sullivan*, 111 S. Ct. at 1769.

To be sure, the language of Section 110(c) referred to in the Administrator's letter was unchanged in the bill as finally enacted, but the post-letter legislative history of the savings clause clarifies that Congress itself did not interpret the 1990 Amendments to require EPA to promulgate such FIPs. Senator Baucus, Chairman of the Conference Committee on the 1990 Amendments, inserted in the Congressional Record a statement, entitled "Clean

Air Conference Report," intended as "an explanation that is much more detailed than the statutory language." 136 Cong. Rec. S16,969 (daily ed. Oct. 27, 1990). The statement indicated that the savings clause is an anti-backsliding provision and that "[w]e do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California and preempt the states and regional air quality planning that is ongoing in the Los Angeles area and will otherwise be required under this legislation." *Id.* at S16,970. The ranking minority member of the Conference Committee confirmed this intention in a colloquy with then-Senator Wilson of California. See 136 Cong. Rec. S17,237 (daily ed. Oct. 27, 1990). Those statements thus specifically addressed the ultimate question raised in the Administrator's letter on which the court of appeals relied.

The court of appeals simply dismissed these indications of legislative intent as the statements of individual legislators entitled to no weight, even though these statements are consistent with the anti-backsliding language of the savings clause. But it is well settled that the statements of individual legislators are entitled to consideration in some instances, particularly where the individuals at issue are those whose explanations are likely to have been viewed as authoritative by the members of the legislative body that enacted the legislation. See, *e.g.*, *National Ass'n of Greeting Card Publishers* v. *United States Postal Serv.*, 462 U.S. 810, 832 n.28 (1983) (statements of conference committee members are "certainly significant," and conference committee reports are "due great weight"); *North Haven Bd. of Education* v. *Bell*, 456 U.S. 512, 526-527 (1982). Here, the chairman and senior minority member of the conference committee made statements squarely supportive of EPA's post-adoption interpretation of the Amendments, and at the very least EPA was entitled to rely on those statements in determining the meaning of the Act as finally adopted. The court of

appeals accordingly erred in rejecting EPA's reasonable interpretation of the 1990 Amendments in favor of its own strained interpretation of the statute.

4. The court of appeals' decision, if allowed to stand, will likely inflict substantial hardship on the citizens and businesses of large segments of the Nation's most populous State. Those areas will suffer more adverse impacts and disruption from EPA's implementation of a FIP than would result from implementation of SIPs designed to achieve the same air quality goals, because EPA does not have the same range of control and enforcement tools available to the State.

The Los Angeles area, despite having the most stringent air pollution controls in the nation, still suffers from the Nation's worst air quality problem. See generally 53 Fed. Reg. 49,494 (1988); 55 Fed. Reg. 36,458 (1990). Any plan to attain the ozone standard there will demand a reduction in ozone-precursor emissions of more than 80 percent even after application of current stringent local regulations. 53 Fed. Reg. 49,495, 49,502 (1988); 55 Fed. Reg. 36,460 (1990); Declaration of David P. Howekamp ¶ 6 (attached to Appellees' Motion To Stay The Issuance Of The Mandate). Attainment will require substantial emission reduction contributions from nearly every sector of the Los Angeles area economy. For instance, controls will be necessary on thousands of industrial sources, including such heavily regulated sources as refineries, utilities, and aerospace facilities, as well as printers, commercial bakeries, electronics firms, and small businesses. Attainment will also demand severe cutbacks in vehicle emissions, perhaps through a combination of forced technological advances and reduced vehicle use. *Id.* at ¶¶ 6, 7, and 8. Beyond that, any attainment plan for the area will require emissions reductions from such nontraditional sources as airport operations, locomotives, marine vessels, recreational vehicles and boats, agricultural equipment and consumer products. *Id.* at ¶¶ 7, 8.

Because the South Coast is classified as an "extreme" ozone area, Congress granted the State until November 15, 1994, to submit major portions of the area's new SIP, and created a unique set of planning requirements applicable only to the South Coast area. 42 U.S.C. 7511 (c)(2) and (e) (Supp. II 1990). If EPA were forced to develop and implement a FIP, not only would the timing of the plan's adoption be altered, but the content of the regulations themselves would differ drastically from the content of a state-adopted plan.

Moreover, an EPA FIP would inflict far more economic and social dislocation on California than would a SIP. There is a vast arsenal of approaches available to state and local governments, but effectively foreclosed to EPA, that can mitigate the disruptive effects of stringent regulation. Local authorities have at their disposal a range of techniques that federal regulators could not legally or feasibly implement and hence that could not be a part of a federal plan.[11] Local authorities can, for example, construct high occupancy vehicle lanes, expand mass transit service, provide carpooling incentives, incorporate air pollution control elements into comprehensive land use and development plans, synchronize traffic signals, meter freeway access ramps, establish one-way streets, provide telecommuting incentives, and maintain automated highway control systems—all designed to reduce motor vehicle emissions.

By contrast, because of EPA's limited ability and resources to implement and enforce measures tailored to local circumstances, it would likely be necessary for an EPA plan to reduce emissions from motor vehicles by

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[11] Section 110(a)(2)(E)(i) of the Act requires the plan to include necessary assurances that the State will have "adequate personnel, funding, and authority * * * to carry out such implementation plan." 42 U.S.C. 7410(a)(2)(E)(i) (Supp. II 1990). Any FIP would need to meet the same requirement. Section 302(y), 42 U.S.C. 7602(y) (Supp. II 1990).

prohibiting or restricting vehicle use through a smaller set of simplistic and extreme measures such as gas rationing, no-drive days, limits on vehicle registration, and bans on high-emitting vehicles. Similarly, a FIP necessarily would rely on a few crude but sweeping measures to force huge cutbacks in solvent use (which is partly responsible for ozone-precursor emissions) and use of other polluting chemicals by industry and other sources.

The history of FIP regulation in the South Coast demonstrates the important practical differences between SIPs and FIPs. In the 1970s, EPA's attempts to formulate a FIP to correct the South Coast's failure to meet the requirements of the 1970 Act relied heavily on massive gas rationing to achieve compliance with the Act. Fiercely negative public reaction led EPA to rescind the plan on the eve of passage of the 1977 Amendments. 41 Fed. Reg. 45,565 (1976); see also 53 Fed. Reg. 49,494, 49,497-49,498 (1988). The committee reports accompanying the 1977 bills to amend the Act recognized the relative crudeness of the FIP that EPA had promulgated in response to state failures under the 1970 Act. See H.R. Rep. No. 294, 95th Cong., 1st Sess. 286-288 (1977), *reprinted in* 4 *Leg. Hist.* 2753-2755 (reviewing EPA's intrusive FIPs of the 1970s and stating that "as a practical matter State and local governments are in a better position than EPA to resolve those pollution problems, which involve millions of motor vehicles"); S. Rep. No. 127, 95th Cong., 1st Sess. 10 (1977), *reprinted in* 3 *Leg. Hist.* 1384 ("The Federal Government does not have the resources to do an effective job of running the air pollution control programs of the State.").

The FIP that EPA proposed just before enactment of the 1990 Amendments further reveals how markedly a South Coast SIP would differ from a FIP for the area. That FIP proposal contrasted the 139 control measures then under careful development by the state and local authorities with the handful of pervasive measures EPA

was including in its proposed FIP. 55 Fed. Reg. 36,470, 36,501 (1990). While the State had not yet adopted most of the measures discussed in the FIP proposal, the blueprint for the State's program listed a vast array of detailed control options that State and local authorities planned to include in a properly developed plan. *Id.* at 36,479-36,484. By contrast, EPA's limited ability to implement many of the measures on the local authorities' list—for instance, the transit improvements and commuter provisions in the South Coast's "Measure 2," *id.* at 36,486-36,487—forced the Agency to limit its proposed FIP to a relative handful of crude measures. *Id.* at 36,501.[12]

The likely result of the decision below, therefore, is that EPA and the State will be formulating very different attainment plans simultaneously over the next few years. Even if the State fulfills its obligation to submit an attainment demonstration in 1994, this merely sets in motion a process lasting until at least 1996 for EPA to review the State's SIP and approve or disapprove it under the applicable requirements. Section 110(k)(1), 42 U.S.C. 7410(k)(1) (Supp. II 1990). In the meantime, as long as EPA's FIP is in effect, sources will need to take steps toward compliance with it, even though the State will be preparing a plan that may make quite different demands on those sources. Because of the uncertainty as to which plans or portions will actually be implemented, the regulated community will suffer substantial confusion in its attempts to make the necessary preparations required to comply.[13]

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[12] Due to the harshness of these measures, EPA proposed in the alternative a FIP composed almost entirely of commitments to formulate FIP measures in the future. 55 Fed. Reg. 36,532-36,533 (1990). The Agency noted, however, that it was "unclear whether a committal FIP for the [South Coast area] would be consistent with the statute." *Id.* at 36,503.

[13] This contrasts with the far narrower scope and negligible impact of the FIPs that EPA was required to promulgate for two

Thus, the court of appeals' decision is likely to cause substantial disruption of economic planning and air quality control in the Los Angeles basin over the next several years. Similar disruption would likely occur in the other California areas directly affected by the panel's decision.[14] Avoiding that disruption and assuring proper implementation of the new statutory scheme enacted by Congress is a matter of such exceptional importance that this Court should review the decision below.

We recognize that the particular legal question presented in this case is of limited scope and of a nonrecurring nature. In light of the potentially severe practical consequences of the decision below, however, we believe that review is warranted. Moreover, in view of the clarity of the pertinent statutory material and the mani-

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Arizona areas pursuant to the court order in *Delaney* v. *EPA*, 898 F.2d 687 (9th Cir.), cert. denied *sub nom. Reilly* v. *Delaney*, 111 S. Ct. 556 (1990). In those areas, EPA was able to write a plan to solve the air quality problem by developing a few moderate, carefully tailored, implementable measures. See 56 Fed. Reg. 5458 (1991). Arizona had already developed and implemented numerous control measures designed to bring the areas—Tucson and Phoenix—into attainment. As a result of Arizona's successful implementation of its measures, by the time EPA was called upon to promulgate a FIP, the Tucson area was already in attainment, and the Phoenix area was on the brink of attainment. Thus, EPA in its FIP for Tucson did not have to adopt any new control measures, and in its FIP for Phoenix needed merely to strengthen two measures previously adopted by Arizona—an oxygenated gasoline program and a gasoline volatility control program. Moreover, before these federal measures could even take effect, Arizona passed legislation mandating equivalent measures. EPA then approved those measures in lieu of the measures contained in its FIP. 57 Fed. Reg. 8268 (1992).

[14] The federal plan for Sacramento, one of the other affected areas, would be similarly intrusive, since attainment of the ozone standard there might require even greater emission reductions from mobile sources, and would have to be implemented on a shorter attainment schedule.

fest error of the divided Ninth Circuit, the Court may wish to consider summary reversal.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to consider summary reversal.

Respectfully submitted.

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NOVEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-55634

D.C. No. CV-88-4414-HLH

COALITION FOR CLEAN AIR; SIERRA CLUB, INC., PLAINTIFFS-APPELLANTS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANT-APPELLEE

v.

SOUTHERN CALIFORNIA EDISON COMPANY, PLAINTIFF-INTERVENOR-APPELLEE

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted April 10, 1992*
Pasadena, California

Filed July 1, 1992

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* The panel unanimously finds Case No. 91-55634 suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Before: Alfred T. Goodwin, William A. Norris, and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Norris; Dissent by Judge Noonan

OPINION

NORRIS, Circuit Judge:

California's South Coast Air Basin has the dirtiest air in the United States.[1] Twenty-two years have passed since Congress first enacted legislation requiring implementation plans to attain national air quality standards, and yet today the South Coast still lacks implementation plans for ozone and carbon monoxide. In 1989, EPA entered into a settlement agreement with appellants requiring it to perform its statutory duty and promulgate federal implementation plans for the South Coast on an expeditious schedule. EPA now argues that, when Congress passed the Clean Air Act Amendments of 1990, it relieved EPA of this obligation and returned the implementation plan process to square one. We disagree and reverse the district court's decision vacating the settlement agreement and dismissing the case. *Coalition for Clean Air v. EPA*, 762 F. Supp. 1399 (C.D. Cal. 1991). We remand to the district court for reinstatement of the agreement and direct the

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[1] The South Coast Air Basin covers much of Southern California including Orange County and the non-desert portions of Los Angeles, Riverside, and San Bernadino Counties. It has by far the worst ozone and nitrogen dioxide levels in the United States and arguably the worst carbon monoxide level of any urbanized area in the United States. 55 Fed. Reg. 36,458, 36,464 (1990).

court to establish an expeditious schedule for EPA to promulgate final implementation plans for the South Coast.

I

The Clean Air Act was passed in 1963, but it was the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), that gave the Clean Air Act the basic structure it retains today. *See generally Train v. NRDC*, 421 U.S. 60, 63-64 (1975) (discussing pre-1970 statutes). The 1970 Amendments created "a federal-state partnership for the control of air pollution." *Abramowitz v. EPA*, 832 F.2d 1071, 1073 (9th Cir. 1987). Section 109 of the Act, as amended, directed EPA to establish National Ambient Air Quality Standards ("NAAQS") for any air pollutants that might endanger public health or welfare. Clean Air Act ("CAA") § 109, 84 Stat. at 1679-80. EPA issued NAAQS for six pollutants in 1971, including carbon monoxide ("CO") and ozone.[2] Responsibility for meeting these standards fell, in the first instance, to the states, which were required to submit State Implementation Plans ("SIPs") by 1972 that would provide for attainment of the NAAQS by 1975. CAA § 110(a)(1), 84 Stat. at 1680. EPA was required to review the SIPs and to disapprove any that failed to meet the requirements of the Act, including the attainment of NAAQS by the statutory deadline. CAA § 110(a)(2), 84 Stat. at 1680-81. If EPA disapproved a SIP, the 1970 Amendments required that EPA adopt a Federal

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[2] The other four pollutants were particulate matter, sulfur dioxide, nitrogen oxides, and hydrocarbons. Lead was added to the list in 1978 and hydrocarbons were removed in 1983. *See Abramowitz*, 832 F.2d at 1073.

Implementation Plan ("FIP") that would meet the requirements of the Act and take the place of the disapproved SIP. CAA § 110(c), 84 Stat. at 1681-82.

In February 1972, California submitted a SIP for the South Coast to EPA. On May 31, 1972, EPA announced its disapproval of major portions of the SIP. 37 Fed. Reg. 10,842, 10,851-10,855 (1972). At that point, EPA was statutorily required to adopt a FIP for the South Coast but failed to act. As the result of a citizens' suit, EPA was placed under a court order to prepare a FIP by January 15, 1973 that would provide for attainment of NAAQS no later than 1977. *Riverside v. Ruckelshaus*, Civ. No. 72-2122-H, 4 Envt'l Rep. Cas. (BNA) 1728, 1731 (C.D. Cal. Nov. 16, 1972). During 1973, EPA issued several proposed FIPs that contained extreme provisions including gas rationing. *See, e.g.*, 38 Fed. Reg. 2194, 2194-2200 (1973); 38 Fed. Reg. 31,232, 31,232-31,255 (1973). On October 15, 1976, EPA revoked its proposed gas rationing regulations, which were due to take effect in 1977, because of "the seriously disruptive social and economic consequences of such regulations," in spite of the fact that the revocation would "render the affected [implementation plans] defective as a legal matter, since such [plans] will no longer contain regulations which provide for NAAQS attainment." 41 Fed. Reg. 45,565 (1976).

Faced with widespread failure by the states to attain NAAQS, Congress amended the Clean Air Act again in 1977, to give "nonattainment" areas more time. Pub. L. No. 95-95, 91 Stat. 685 (1977). The deadline for NAAQS attainment was extended to 1982. CAA § 172, 91 Stat. at 746-48. On July 25, 1979, California submitted a SIP for the South Coast Air Basin requesting an extension of the ozone and

CO attainment dates to 1987. EPA proposed to disapprove the SIP because California had failed to adopt a motor vehicle inspection and maintenance program, which was required as a condition for granting such an extension. 45 Fed. Reg. 21,271, 21,271-21,282 (1980). EPA took final action disapproving the SIPs for ozone and CO on January 21, 1981. 46 Fed. Reg. 5965, 5975 (1981).

In 1982, California submitted extensive revisions to its proposed South Coast SIPs for ozone and CO. These 1982 proposed SIPs acknowledged that even if the plans were fully implemented, the South Coast would fail to attain the ozone and CO NAAQS by 1987. 48 Fed. Reg. 5074, 5082-5083 (1983). On February 3, 1983, EPA proposed to disapprove the 1982 SIPs. *Id.* at 5074. California submitted further revisions, and EPA took final action on July 30, 1984, approving the CO and ozone control measures without requiring any demonstration that those measures would achieve attainment by the statutory deadline. EPA simply noted that it was deferring any final approval or disapproval of the SIP's attainment provisions. 49 Fed. Reg. 30,300, 30,305 (1984); *see Abramowitz*, 832 F.2d at 1074.

In September 1984, a citizen timely petitioned this court for review of the EPA's 1984 decision. We held that "EPA exceeded its authority under the Clean Air Act by approving the control measures without determining whether those measures would demonstrate attainment by the December 31, 1987 statutory deadline." *Abramowitz*, 832 F.2d at 1072-73. We remanded "with the specific instruction that EPA disapprove the relevant portions of the SIP and face up to implementing the measures which are to be triggered by failure to meet attainment re-

quirements." *Id.* at 1073. In compliance with our order, EPA disapproved the South Coast SIPs for ozone and CO on January 22, 1988, triggering once again EPA's statutory obligation to adopt FIPs for the South Coast Air Basin. 53 Fed. Reg. 1780 (1988).

On February 22, 1988, appellants Coalition for Clean Air and the Sierra Club filed this citizens' suit to enforce EPA's obligation to promulgate ozone and CO FIPs for the South Coast. In March 1989, EPA entered into a settlement agreement with plaintiffs, which obligated it to prepare, propose, and promulgate final FIPs for the South Coast. Because of the 1989 San Francisco earthquake, the district court extended EPA's deadline for publishing the proposed FIPs from April 30 to July 31, 1900. EPA finally published the proposed FIPs on September 5, 1990, and agreed to finalize them by February 28, 1991. 55 Fed. Reg. 36,458, 36,458-36,576 (1990).

In the meantime, EPA sought across-the-board relief from its statutory obligation to promulgate FIPs from Congress, which had begun to consider new amendments to the Clean Air Act. In September 1989, at EPA's urging, the Senate passed an amendment that would have left promulgation of FIPs to EPA's discretion. *See* S. 1630, 101st Cong., 1st Sess., § 105 (1989). In May 1990, a House Committee deleted this language, which prompted a letter from EPA Administrator Reilly complaining that the House action would require promulgation of a FIP imposing "across-the-board, draconian measures devastating the country's largest industrial area," an obvious reference to the South Coast Air Basin. 136 Cong. Rec. H2771, H2887 (daily ed. May 23, 1990). However, Administrator Reilly's complaint went un-

heeded by Congress. The House language retaining EPA's mandatory obligation to promulgate a FIP whenever it disapproves a SIP was ultimately enacted by Congress and signed into law by President Bush on November 15, 1991 as part of the Clean Air Act Amendments of 1990. Pub. L. No. 101-549, 104 Stat. 2399 (1990).

On November 30, 1991, EPA filed a motion asking the district court to vacate the settlement agreement and dismiss the case on the basis of the 1990 Amendments. EPA argued that Congress could not have intended to continue EPA's obligation to promulgate FIPs for the South Coast under the settlement agreement because the 1990 Amendments contained new criteria and new timetables for attainment, which EPA claimed the states must address in the first instance. Under EPA's interpretation of the 1990 Amendments, its mandatory obligation to promulgate FIPs would be triggered only if California failed to submit adequate SIPs under the new deadlines. The earliest date FIPs would be required for the South Coast under this interpretation of the 1990 Amendments is April 15, 1998. The district court granted EPA's motion to vacate the settlement agreement and dismissed the case. This appeal followed.[3]

Appellants make two arguments in support of their position that EPA is currently obligated to promulgate ozone and CO FIPs for the South Coast. First, they argue that § 110(c)(1)(B) of the Clean Air Act, as amended, did not relieve EPA of its obliga-

[3] In a separate action, EPA moved to vacate a settlement agreement requiring it to promulgate a FIP for the Sacramento area. The district court denied EPA's motion on December 2, 1991. *Environmental Council of Sacramento v. EPA*, Civ. No. S-87-420 EJG, (E.D. Cal. Dec. 2, 1991).

tion to promulgate these FIPs. Second, they argue that even if § 110(c)(1) had been amended to relieve EPA of its FIP obligation, the Amendments' Savings Clause—§ 193 of the Clean Air Act—would have preserved EPA's obligation under the settlement agreement. Because we hold that § 110(c)(1)(B) imposes a current obligation on EPA to promulgate ozone and CO FIPs for the South Coast, we do not reach the Savings Clause question.

II

EPA's statutory obligation to promulgate FIPs is contained in § 110(c)(1) of the Clean Air Act, as amended in 1990:

> The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
>
> > (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 7410(k)(1)(A) of this title, or
> >
> > (B) disapproves a State implementation plan submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c)(1). Appellants contend that under subsection (B), EPA is obligated to promulgate ozone and CO FIPs for South Coast based on its

disapproval in January 1988 of California's proposed SIPs. EPA, on the other hand, contends that § 110 (c) (1), as amended in 1990, was intended to operate prospectively only, so that EPA's obligation to promulgate a FIP for the South Coast will be triggered only if California fails to submit a SIP that meets the requirements of the Clean Air Act by the deadlines set forth in the 1990 Amendments.

A

We begin with the language of the provision: "The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator . . . disapproves a State implementation plan submission in whole or in part." This language is not, by its terms, limited to EPA's disapproval of "newly submitted" SIPs or SIPs "submitted under the 1990 Amendments." Instead it refers to disapproval of state implementations plans generally, either in whole or in part. EPA must promulgate a FIP within two years of such disapproval, unless the state submits and EPA approves revisions to the SIP that correct the deficiency. Since EPA disapproved the South Coast SIPs in January 1988, the statute on its face requires EPA to promulgate FIPs for the South Coast by January 1990.[4]

We recognize that EPA's obligation under § 110 (c) (1) is put in the future tense. However, the time referred to by the word "shall" is two years from any of the triggering events listed in the provision, not

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[4] Under the terms of the pre-1990 Act, EPA had only six months from the date that the original state submission was due in which to promulgate a FIP. 84 Stat. at 1681-82.

two years from enactment of the 1990 Amendments.[5] Triggering event (A) actually includes two separate events: (1) EPA's finding that a state has failed to make a required submission, and (2) EPA's finding that a submission fails to meet the minimum criteria for completeness established under § 7410 (k) (1) (A). Since § 7410(k) (1) (A) was added by the 1990 Amendments, it appears that the second of these findings could only occur after enactment of the 1990 Amendments. However, neither the first of these findings nor triggering event (B)—disapproval of "a State implementation plan submission in whole or in part"—contains any similar temporal limitation. Since these events could occur in the past or in the future, the use of the future tense "shall" to express EPA's obligation does not indicate Congress' intent that § 110(c) (1) operate prospectively only. In other words, if "disapproves" refers to past disapprovals as well as to future ones, "shall" is the appropriate word to describe obligations which may already have been triggered as well as those which may be triggered in the future.

However, EPA argues that the word "disapproves" cannot refer to past disapprovals because it is phrased in the present tense. EPA relies heavily on *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57-59 (1988), in which the Supreme Court interpreted a provision authorizing citizens' suits against persons "alleged to be in violation of" pollution permits as

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[5] Thus, we agree with Judge Noonan that the language of § 110(c) (1) is "future-looking." Dissent at 7755. We disagree, however, that § 110(c) (1) looks to the future from the time of the 1990 Amendments' enactment as opposed to the time of the triggering events listed in § 110(c) (1).

requiring continuous or intermittent violations. However, that case involved more than use of the present tense. It also involved the phrase "in violation," which, coupled with the present tense, suggests a focus on current violations that use of the present tense by itself would not. Moreover, EPA's argument proves too much. As appellants point out, the Clean Air Act, as amended, uses the present tense frequently. For example, Congress uses the present tense to establish criminal liability for "[a]ny person who knowingly—(A) *makes* any false material statement, . . . (B) *fails* to notify or report as required under this Act; . . ." 42 U.S.C. § 7413(c)(2) (emphasis added). Yet clearly the 1990 Amendments do not forgive criminal violations that occurred prior to the Amendments just because Congress speaks in the present tense. The present tense is commonly used to refer to past, present, and future all at the same time. We believe that Congress used the present tense word "disapproves" because it did *not* wish to limit § 110(c)(1)(B)'s reach to either past or future disapprovals.

Unlike Judge Noonan, we attach no weight to the fact that Congress chose to repeal an awkwardly drafted § 110(c)(1) and replace it with a clearer version. *See Dissent* at 7752-53.[6] The new § 110

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[6] Nor, in our view, is it significant that Congress chose to increase the time EPA is given to prepare a FIP to two years and to permit states to correct deficiencies in their SIPs at any time within those two years. *See* Dissent at 7753-54. Both these changes affect what happens *after* EPA's duty to promulgate a FIP has been triggered. Neither one bears on *when* EPA's duty is triggered, which is the critical question in this case.

(c)(1) contains the same triggering events as the old § 110(c)(1).[7] Judge Noonan asserts that subsection (B) of the amended § 110(c)(1) is new, *see* Dissent at 7755, but it is not. The current subsection (B) merely incorporates the old subsection (B), which required promulgation of a FIP when a SIP was determined not to meet the requirements of the Act. *See* 84 Stat. at 1681-82. Judge Noonan also focuses on the fact that the 1990 Amendments added a new triggering event: EPA's finding that a submission fails to meet the minimum criteria for completeness established under § 7410(k)(1)(A). *See* Dissent at 7753. He says there is no reason to ignore subsection (A) in interpreting subsection (B). *Id.* at 7755. The problem with this analysis is that Congress put the word "or" between (A) and (B). Indeed, Congress put the word "or" between the two separate triggering events contained in subsection (A). Clearly Congress intended that EPA's obligation to promulgate a FIP would be triggered by any one of the three triggering events contained in § 110(c)(1) as amended.

In short, the plain language of § 110(c)(1)(B) supports appellants' contention that EPA is currently obligated to promulgate FIPs for the South Coast

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[7] Prior to 1990, § 110(c)(1) contained three triggering events, all of which have been incorporated in the new § 110(c)(1). Old subsection (A) dealt with a State's failure to submit a SIP. Old subsection (C) dealt with a State's failure to revise a SIP. Both situations are now incorporated in subsection (A) which refers broadly to "required submission[s]." Old subsection (B), which required promulgation of a FIP when a SIP was determined not to meet the requirements of the Act, is incorporated in current subsection (B), which requires promulgation of a FIP when EPA disapproves a SIP.

based on its January 1988 disapproval of California's proposed SIPs.

B

EPA also argues that requiring it to promulgate FIPs for the South Coast at this time would be inconsistent with the 1990 Amendments as a whole because those Amendments impose new deadlines and change certain requirements of the Clean Air Act. The district court found this argument persuasive. It reasoned that if the Act were interpreted to continue EPA's existing obligation to promulgate FIPs for the South Coast, "there would be the anomaly that the SIP prepared by the State under the former criteria and rejected is to be replaced by a FIP prepared under new criteria that the State has never had an opportunity to address." *Coalition for Clean Air*, 762 F. Supp. at 1401. Of course, the proper contents of FIPs for the South Coast are not before us, and we need not decide whether EPA would be required to meet any additional requirements imposed by the 1990 Amendments in promulgating FIPs for the South Coast. The sole question on appeal is whether EPA's obligation to promulgate such FIPs survived the 1990 Amendments. We therefore consider the 1990 changes in the Act's deadlines and requirements for the limited purpose of deciding whether an "anomaly" would result from enforcing the plain language of § 110(c)(1)(B).

On closer inspection, we find that no such anomaly exists. EPA points to the fact that the 1990 Amendments extend the deadlines for attainment of ozone and CO standards for the South Coast until 2010 and 2000 respectively. 42 U.S.C. §7511(a)(1); *id.* § 7512(a)(1). Yet the FIP that EPA has proposed

to adopt for the South Coast, ostensibly under the requirements of the old Clean Air Act, provided for attainment of these standards on precisely the same schedule. 55 Fed. Reg. 36,458, 36,500 (1990). Thus, EPA cannot claim that continuing its obligation to promulgate a FIP for the South Coast will deny the region any extra time to which they would be entitled under the 1990 Amendments.[8]

EPA also argues that the 1990 Amendments require new measures to control oxides of nitrogen (NOx) and volatile organic compounds (VOCs), which are precursors of ozone, which the state must address in the first instance. 42 U.S.C. § 7511a(f). However, there is no reason the state may not propose these new measures as revisions to the FIP under the timetables provided in the 1990 Amendments just as the state would be required to do if a FIP had been in effect when those Amendments were adopted. *See* 42 U.S.C. § 7511a(e). Appellants have not argued that EPA's continuing obligation to promulgate FIPs relieves the state of any new obligations imposed by the 1990 Amendments.

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[8] Judge Noonan asserts that Congress removed the basis for appellants' claim when it extended the deadlines for attainment, but this argument proves too much. *See* Dissent at 7756. By the same logic, Congress would at the same time have removed the basis for all existing FIPs that rest on a state's past failure to meet a deadline. We are aware of nothing in the 1990 Amendments or their legislative history indicating that Congress intended to invalidate all existing FIPs. Indeed EPA agreed at oral argument that, if the South Coast FIPs had been in effect at the time of the 1990 Amendment, those amendments would not have provided the basis for vacating the existing FIPs.

Finally, EPA points out that the 1990 Amendments authorize it, under certain conditions, to approve SIP provisions for the attainment of ozone standards for the South Coast that anticipate new control techniques or the improvement of existing techniques and base attainment on the use of such technological advances. 42 U.S.C. § 7511a(e)(5). This new provision may allow EPA to approve some parts of the ozone SIP that it disapproved in 1988, and Judge Noonan points out that it would "make nonsense" of the 1990 Amendments not to give effect to this provision. *See* Dissent at 7756. However, under § 110(c)(1), EPA has authority to approve a SIP that meets the requirements of the Act at any time prior to the actual promulgation of a FIP. 42 U.S.C. § 7410(c)(1). Thus, there appears to be nothing to stop EPA from allowing California to rely on anticipated technology by approving SIP provisions that now meet the requirements of the Act.

Running throughout EPA's argument is the notion that federal involvement necessarily preempts state planning to control air pollution. However, this is a misconception. The Clean Air Act creates "a federal-state partnership for the control of air pollution," *Abramowitz v. EPA*, 832 F.2d at 1073, which continues after EPA's obligation to promulgate a FIP has been triggered.[9] As we have just observed, the

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[9] Judge Noonan cites Congress' finding in § 101 of the Act that prevention and control of air pollution is "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); Dissent at 7757. But Congress also found "that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local government programs to prevent and control air pollution." 42 U.S.C. § 7401(a)(4). Moreover, Congress' de-

state may propose and EPA may approve revisions to a proposed SIP that meet the requirements of the Act at any time prior to the actual promulgation of a FIP. 42 U.S.C. § 7410(c)(1).[10] Even after a FIP is promulgated, the states remain responsible for submitting revisions to the FIP if EPA changes the air quality standards, *see* 42 U.S.C. § 7410(a)(1), or if Congress changes the provisions of the Act, *see, e.g.*, 42 U.S.C. § 7511a(e).[11] Thus, we fail to see how enforcing the plain terms of § 110(c)(1)(B) will create an unintended anomaly.

C

Although the language of § 110(c)(1)(B) is clear on its face, EPA contends that statements by Senators Baucus and Chafee relating to § 193—the Sav-

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cision to require mandatory FIPs if the states failed to provide for attainment of NAAQS shows that Congress did not intend to leave air pollution control to the states alone. Contrary to Judge Noonan's assertion, it does not stand the Clean Air Act on its head to enforce a mandatory obligation imposed by Congress. *See* Dissent at 7757.

[10] Moreover, a FIP, as defined by the 1990 Amendments, is specifically designed to supplement rather than to replace state planning: "a plan (or portion thereof) promulgated by the Administrator *to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan.*" 42 U.S.C. § 7602(y) (emphasis added).

[11] Under § 7511a(e), the state is required to submit revisions to the "applicable implementation plan." The Act defines "applicable implementation plan" as "the portion (or portions) of the implementation plan or most recent revision thereof, which has been approved under section 7410, or promulgated under section 7410(c)." 42 U.S.C. § 7602(q). In other words, it refers both to SIPs approved by EPA and to FIPs promulgated by EPA.

ings Clause—demonstrate Congress' intent to relieve EPA of its obligation to promulgate FIPs for the South Coast. We reject this contention for several reasons. First, there is no need to refer to the legislative history of a statute when the language of the statute is clear. *Toibb v. Radloff*, 111 S. Ct. 2197, 2200 (1991). Second, the statements of individual legislators are entitled to little, if any, weight. "[I]t is the official committee reports that provide the authoritative expression of legislative intent. . . . Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill." *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988); *United States v. Shaw*, 936 F.2d 412, 416 (9th Cir. 1991). Third, we do not think that the statements by Senators Baucus and Chafee support the EPA's interpretation.

Senator Baucus made the following statements on the floor of the Senate during its final debate on the 1990 Amendments:

> The savings clause in the new legislation is intended to ensure that no backsliding occurs from implementation of adopted, currently feasible measures that EPA has approved as part of a SIP in the past, or currently feasible measures that EPA has added to state plans on its own initiative or pursuant to a court order of settlement, including a Federal Implementation Plan. We do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California and preempt the states and regional air quality planning that is ongoing in the Los Angeles area and will otherwise be required un-

> der this legislation. If EPA were to promulgate complete new plans based on requirements of the old Act, the areas subject to those federal plans would be deprived of the opportunity to use the significantly revised and clearly more workable requirements of the new legislation. We agree that this would be unreasonable, particularly since the proposed FIP fails to recognize the critical role that local governments play in reducing transportation-related emissions.
>
> The savings clause provides EPA with significant discretion with respect to FIPs in California. EPA has the obligation to adopt control measures for sources which it exclusively controls when those controls are necessary to help attain national standards or meet other requirements of the Act. But, beyond that, EPA should complete ongoing FIP processes only for the purposes of ensuring that the standards are met by the statutory deadlines.

136 Cong. Rec. S16970 (daily ed. Oct. 27, 1990). Senator Chafee made an almost identical statement. *See* 136 Cong. Rec. S17,237 (daily ed. Oct. 27, 1990). EPA relies on the portion of Senator Baucus' statement that says "[w]e do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California . . . ." It is clear from what follows this statement, however, that Senator Baucus' concern is that the FIP not "preempt the states and regional air quality planning that is ongoing in the Los Angeles area and will otherwise be required under this legislation." As we noted in part II.B, *supra*, maintaining EPA's obligation to promulgate ozone and CO FIPs for the South Coast

will not have the effect of preempting state planning or the new state submissions that are required under the 1990 Amendments. Moreover, if EPA's interpretation of Senator Baucus' statement is correct, it is difficult to understand his reference towards the end of the statement to EPA's completing "ongoing FIP processes."

EPA's interpretation is also contradicted by another piece of legislative history that relates specifically to § 110(c)(1) rather than to the Savings Clause. In May, 1990, when the House deleted language that would have made EPA's obligation to promulgate FIPs discretionary, EPA Administrator Reilly wrote to House Speaker Foley:

> The House has [deleted] language that relieved EPA of its current obligations to complete federal implementations plans (FIP's). If current FIP obligations are not relieved, EPA must impose across-the-board, draconian measures devastating the country's largest industrial area. In light of the new regime for state plan submissions, it makes no sense for EPA to impose FIPs before the states have had a chance to meet their new obligations. For these reasons, the Administration strongly objects to the Committee's approach.

136 Cong. Rec. H2771, H2887 (daily ed. May 23, 1990). Thus, EPA complained directly to Congress that unless the language of § 110(c)(1) were changed, EPA would have to promulgate FIPs for the South Coast. However, Congress declined to change the language of the statute. At a minimum, this letter and Congress' response to it show that it is not inconsistent with Congress' intent to require completion

of ongoing FIP processes since Congress adopted language that EPA said would have precisely that effect. We may only speculate about what Congress would think of EPA's current litigation position, which directly contradicts its representation to Congress.

D

EPA also argues that we should defer to its interpretation of the statute because it is the administering agency. *See Chevron USA Inc. v. NRDC*, 467 U.S. 837, 843-45 (1984). Under Chevron, we are required first to exhaust the "traditional tools of statutory construction" to determine if Congress has spoken to the precise question at issue. *Id.* at 843 n.9. "If the intent of Congress is clear, that is the end of the matter." *Id.* at 842-43. In this case, the plain language of § 110(c)(1) expresses Congress' intent that EPA promulgate a FIP when it has previously disapproved a SIP.

However, even if we were to conclude that Congress had no intent on the question, it is doubtful that EPA's interpretation of § 110(c)(1) would be entitled to deference. Its current interpretation is in direct conflict with the interpretation that it expressed to Congress. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981). This is not a case in which the agency's change of interpretation reflects accumulated experience or responds to changing circumstances. *See Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991). Nor has the agency justified this change with "reasoned analysis." *Id.* This is simply a case in which the agency, having failed to get Congress to

adopt its position, asks the court to do what Congress would not.

E

In sum, we hold that EPA is currently obligated to promulgate ozone and CO FIPs for the South Coast under the plain terms of § 110(c)(1)(B) based on its disapproval of California's proposed SIPs in January 1988. Accordingly, we reverse the decision of the district court. We remand with instructions that the district court reinstate the settlement agreement and establish an expeditious schedule for the promulgation of final FIPs for the South Coast. In establishing the schedule, the district court should bear in mind that promulgation of these FIPs has already been delayed far beyond the statutory deadline, that EPA has already published proposed FIPs for the South Coast, and that the deadline for promulgation of final FIPs was only three months away when EPA moved to vacate the settlement agreement.

III

We turn last to the question of attorney's fees. In an unpublished order, the district court denied appellants' motion for fees in large part. We review the award or denial of attorney's fees for abuse of discretion, but any elements of legal analysis and statutory interpretation which figure in the district court's decision are reviewable de novo. *Keith v. Volpe*, 833 F.2d 850, 854 (9th Cir. 1987). We will reverse if the district court misperceives or misapplies the law governing fee awards. *Ackerley Communications v. City of Salem*, 752 F.2d 1394, 1396 (9th Cir. 1985).

The district court denied appellants fees against EPA for their work opposing the motion to vacate the settlement agreement and dismiss the suit on the ground that appellants had not prevailed in that stage of the litigation. In light of appellants' success on appeal, we hold that they are entitled to fees for their work below. "[A] plaintiff who is unsuccessful at a stage of litigation that was a necessary step to [its] ultimate victory is entitled to attorney's fees even for the unsuccessful stage." *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991).

The district court also denied appellants fees against EPA for their work opposing EPA's motion to extend the deadlines under the settlement agreement for the proposed and final FIPs. The district court granted EPA's motion to extend the deadline for the proposed FIPs because of the disruption caused by the 1989 San Francisco earthquake. It denied without prejudice EPA's motion to extend the deadline for the final FIPs. The district court concluded that appellants' opposition to the motions was both unsuccessful and unreasonable. We hold that the district court did not abuse its discretion in doing so.

The district court awarded fees against EPA for only 24 hours of work preparing the motion for fees because the court thought it was unreasonable for appellants to move for fees without first attempting a fee settlement. However, local rules do not require parties to confer before filing for fees. In fact, local rule 16.10 requires that motions for fees be filed within 30 days of judgment. Furthermore, in their motion for fees, appellants invited EPA to make an offer regarding fees rather than litigate the matter. EPA responded by choosing to litigate. The Supreme

Court has stated that "[i]deally, of course, litigants will settle the amount of the fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). However, this preference for settlement is not embodied in any binding rule. The district court's decision to limit fees for the fee motion on the basis that appellants failed to attempt settlement elevates this preference to the status of a court rule. As such, the decision is a misapplication of law that is not shielded under the abuse of discretion standard. *See Ackerley*, 752 F.2d at 1396. We hold that the district court erred in limiting the fees for preparing the fee motion to 24 hours. EPA's argument that these fees should be reduced because the fee motion was only partially successful should be addressed to the district court on remand.

Finally, the district court denied appellants fees against Southern California Edison for their work opposing Edison's intervention of as plaintiff.[12] The language of 42 U.S.C. § 7604(d) does not preclude an award of fees against a private intervenor. However, "special care" is called for when awarding fees against a private party rather than a government entity because of "[d]iffering abilities to bear the cost of legal fees and differing notions of responsibility for fulfilling the goals of the Clean Air Act." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692 n.12 (1983). The D.C. Circuit has held that fees against a private intervenor are not appropriate if the intervenor "took a position that reasonably attempted to advance the implementation of the Act." *NRDC v. Thomas*, 801 F.2d 457, 462 (D.C. Cir. 1986);

[12] EPA has taken no position on the question whether appellants are entitled to fees against Edison.

Sierra Club v. EPA, 769 F.2d 796, 810 (D.C. Cir. 1985). We believe this test is sound. Applying it to the facts of this case, we hold that appellants are not entitled to fees against Edison. While Edison's position differed in many respects from the position advanced by appellants, it was reasonably consistent with advancing the implementation of the Clean Air Act. Accordingly, we affirm the district court's decision denying fees against plaintiff-intervenor Edison.

IV

For the reasons stated herein, the decision of the district court vacating the settlement agreement and dismissing the case is REVERSED. The case is REMANDED for reinstatement of the agreement. On remand the district court is instructed to establish an expeditious schedule for promulgation of final ozone and CO FIPs for the South Coast consistent with this opinion. The district court's order denying attorney's fees is AFFIRMED in part and REVERSED in part.

NOONAN, Circuit Judge, dissenting:

This case turns on the meaning of an act of Congress. In determining that meaning we need not go beyond the text if, as I believe, the text is clear. In particular, I see no need to rely on the statements of Senators Baucus and Chafee or to take into account the statement, made in the course of legislative bargaining in May 1990, by EPA Administrator Reilly. These statements serve only to confirm what anyone would know, that Congress was acutely aware of the air pollution problem of the South Coast and legis-

lated with that problem in mind. The meaning of the statute, however, does not depend on the Senators' or the Administrator's gloss.

The Background Litigation.

On January 22, 1988, EPA disapproved California's SIPs for the South Coast ozone and carbon monoxide levels. On February 22, 1988 the Coalition for Clean Air and the Sierra Club ("the Coalition") brought suit against EPA seeking an order under the Clean Air Act Amendments of 1970 (the 1970 Amendments), directing EPA under 42 U.S.C. § 7410 (c) of the Act to prepare, propose and promulgate a FIP for the South Coast that would provide for the attainment of the then existing air standards for ozone and carbon monoxide. On February 13, 1989, the parties entered into a "Stipulation and Agreement of Partial Settlement" ("the Settlement"). The EPA agreed to publish its tentative FIP in the Federal Register by April 30, 1990 and to set forth its final implementation plan in the Federal Register by February 28, 1991. The suit was stayed till March 31, 1991. The parties reserved the right to argue to the court the effect of any legislation that might be passed by Congress during the stay.

The Coalition had the right under the Settlement to move the court to vacate the stay if EPA did not keep the agreed deadlines. EPA did not observe the deadlines. The district court extended the date for the tentative FIP to July 31, 1990. EPA actually filed it in September 1990. The final FIP was never published.

In November 1990 Congress enacted the Clean Air Act Amendments of 1990 ("the 1990 Amendments").

The stay was never vacated, and it continued to be in effect when on November 30, 1990 EPA brought this action to vacate the settlement and dismiss the Coalition's complaint.

The Repeal of Section 7410(c) of the 1970 Amendments.

The following language of the 1970 Amendments was deleted by the 1990 Amendments:

> (1) The Administrator shall, after consideration of any state hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—
>
> > (A) the State fails to submit an implementation plan which meets the requirements of this section,
> >
> > (B) the plan or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or
> >
> > (C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.
>
> If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of

> such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 of this title shall not be required to be promulgated before the date eight months after such date required for submission.

It was this language that imposed a categorical obligation on EPA to issue a FIP if a state defaulted on its obligation to provide a suitable SIP. It was this language on which the Coalition had relied in the suit that resulted in the Settlement. With the excision of this language by Congress the foundation of the Settlement disappeared.

New Section 7410(c) of the 1990 Amendments.

Congress in 1990 rewrote Section 7410(c) as follows:

> (1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
>
> > (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 7410(k)(1)(A).

The 1990 Amendments imposed an obligation of EPA to issue a FIP within 2 years of a state's de-

fault, rather than the obligation to do so "promptly" or within six to eight months as the 1970 Amendments required. The 1990 Amendments triggered this obligation by reference to an entirely new part of the law, § 7410(k). The provision required EPA to set "minimum criteria" for any state plan and to do so "within 9 months after the enactment of the Clean Air Act Amendments of 1990."

Alternatively, the EPA acquired the obligation to issue a FIP "within 2 years after the Administrator . . . (B) disapproves a State implementation plan in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or revision, before the Administrator promulgates such Federal implementation plan." Section 7410(c)(1)(B).

It is this language that the Coalition now relies on. It is the language that the Coalition maintains imposes the same obligation on EPA that existed under the 1970 Amendments. It is this language that the Coalition argues is to be understood as applicable not only to future but to past disapprovals of State plans by EPA.

Comparison of the new language with the old dispels the Coalition's contention. First, it is doubtful that a verb in the present tense, "disapproves," can be read as a verb in the past tense, "has disapproved." *Gwaltney* indicates that it should not be so read. *Gwaltney & Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59 (1989). Second, the old language provided that the EPA should "promptly" move to publish a FIP once the Administrator had determined that the State plan was not "in accordance with the requirements of this section." The new language gives EPA two years within

which it should issue a FIP. Third, the old language gave the State 60 days or a longer period prescribed by EPA to correct a provision of the plan relating to air quality control. The new language permits the State to correct any deficiency without any time limit being prescribed short of the two years set by the statute for EPA's action. The old statute has been repealed. The new statute is certainly comparable, but its language is future-looking and its commands different from the old.

This conclusion comes from inspection of (B), the fragment of the new law on which the Coalition relies. The conclusion is reinforced if the new law is inspected more broadly. To begin with, the Coalition argues as though new (A) were not on the books. There is no reason to ignore (A). It gives a cross-reference to another new and important part of the 1990 Amendments, Section 7410(k)(1)(A). This section begins, "Within 9 months after the date of the Clean Air Act Amendments of 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this section." Beyond dispute, EPA's obligations here are set in terms of the date of enactment of the 1990 Amendments. To suppose that its obligations under (B) are not is to do violence to the sense of the statute.

Section 7410(k), to which A makes cross-reference, goes on to lay out an elaborate timetable for EPA action in regard to State plans that do or do not meet the minimum criteria. The Coalition's narrow focus on B reads this timetable out of the law. On the Coalition's reading, none of Section 7410(k) has any relevance because EPA disapproved Cali-

fornia's SIP in 1988. The Coalition's reading makes otiose as regards a major area of the country the careful prescriptions of the 1990 Amendments. By every canon of construction A and B should be read harmoniously and as a whole.

The Coalition argues that "Section 110c [Section 7410(d)] was not new." Read as simply B of the new Section 7410(c), it was new. Read again as both A and B of the new Section 7410(c), it was new. The contention that it was not disregards the text of the statute.

Other Relevant Changes Made by the 1990 Amendments.

The 1977 Amendments to the Clean Air Act required a State to attain the required air quality standards by December 31, 1987. 42 U.S.C. § 7502 (a)(2) (as of 1977). It was California's failure to provide for this attainment that led EPA to disapprove the State's SIP. The date set by the 1977 Amendments was eradicated by the 1990 Amendments. The South Coast must now demonstrate attainment with the carbon monoxide standard by 2000 and with the ozone standard by 2010, 42 U.S.C. § 7512(a)(1). The new statute removes the basis for the Settlement. The Coalition in its Opening and Reply Briefs fails to address this substantial change in the law.

The 1990 Amendments also provide a detailed timetable in accordance with which California must move to the attainment of the goals to be achieved by 2000 and 2010. This timetable is set in explicit reference to the date of the enactment of the 1990 Amendments, see, e.g., 42 U.S.C. § 7511a(c), (d) and (e).

It makes nonsense of the provisions of this timetable to superimpose upon them the Settlement which depends on the 1970 and 1977 Amendments.

For the first time the new law permits EPA to approve, in a statutorily defined Extreme Area (such is the South Coast for ozone), provisions of a SIP which "anticipate development of new control techniques," provided that "such provisions are not necessary to achieve the incremental emission reductions required during the first 10 years after the date of the Clean Air Act Amendments of 1990." 42 U.S.C. § 7511a(e)(5). Again, the timing is set in terms of the 1990 Amendments. Again, something different has been added. EPA had disapproved California's SIPs in terms of the old law that left no such possibility for technological breakthroughs. It would again make nonsense of the new law to hold that the old disapproval must continue in effect despite the relaxation of the standards effected by the 1990 changes.

The Clean Air Act of 1960 proclaimed that "the prevention and control of air pollution at its source is the primary responsibility of state and local governments." 42 U.S.C. § 7401(a)(3) (unamended). The Act stated one of its purposes was "to provide technical and financial assistance to state and local governments in connection with the development and execution of their air pollution prevention and control programs." 42 U.S.C. § 7401(b)(3) (unamended). The 1990 Amendments left (b)(3) unchanged. The 1990 Amendments amended (a)(3) to declare "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of state and local governments." 42

U.S.C. § 7401(a)(3) (1990)). In the face of this ringing assertion of state primacy, the Coalition's argument for federal action stands the legislation on its head.

The Clean Air Act in its original form and as amended in 1990 specifies that the State has primary responsibility for satisfying pollution requirements and requires it to develop a plan in the first instance. That applies to the new requirements enacted in 1990. California must have an opportunity to address these requirements before EPA steps into the breach.

The Savings Clause.

The Coalition's fallback position, not reached by the majority opinion, is that the 1990 Amendments contain what is styled "General Savings Clause." This part of the statute reads as follows:

> General savings clause
>
> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this Act, as in effect before the date of the enactment of the Clean Air Act Amendments of 1990 shall remain in effect according to its terms, except to the extent otherwise provided under this Act, inconsistent with any provision of this Act, or revised by the Administrator. No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the date of the enactment of the Clean Air Act Amendments of 1990 in any area which is a containment area for any air pollutant may be modified after such enactment in any manner unless the modification

> insures equivalent or greater emission reductions of such air pollutant.

42 U.S.C. § 7515.

The only possibly relevant language is the single sentence that speaks of a "control requirement" "required to be adopted by an order, settlement agreement or plan in effect before the date of the enactment of the Clean Air Act Amendments of 1990. . . ." But even this language does not help the Coalition. A "control requirement" is a term of art. A control requirement is "a discrete regulation directed at a source of pollution." 56 Fed. Reg. 828 (January 9, 1991). In the same way, the 1990 Amendments under the caption "Control requirements" speak of the regulations imposed on "a unit," e.g., a fossil fuel-fired combustion device, 42 U.S.C. § 7651k(1) and § 7651a(15).

A control requirement is not a FIP. The Settlement Agreement required EPA to promulgate a FIP. The Settlement Agreement did not require the adoption of any particular control requirement. The General Savings Clause, therefore, does not save the Settlement Agreement.

To the contrary, the regular rule *expressio unius, exclusio alterius* applies. Congress enumerated what it wanted to survive the repeals effected by the 1990 Amendments. As the majority opinion correctly notes, Congress did not repeal the basis for existing FIPs. The 1990 Amendments specifically preserved every regulation in effect before the date of the amendments. The Settlement Agreement that merely required a FIP was not a regulation and it was not a control agreement. It was not spared.

Expressio unius, exclusio alterius—this standard method of interpreting a statute was first invoked here by the Coalition. But its application defeats the Coalition's reading of the 1990 Amendments. Saving regulations and control requirements, Congress deliberately and decisively omitted the kind of settlement the Coalition relies on.

Conclusion.

There is no one, I suppose, who does not desire a cleaner, brighter, healthier South Coast. Attainment of the goal, however, is not without substantial costs. The conflict that the costs have caused is reflected in the actions of EPA and in the congressional legislation. The Coalition makes much of the delay in achieving acceptable standards for ozone and carbon monoxide. It accuses EPA of "footdragging" and even of "entrenched footdragging," a difficult accomplishment. But even if the courts could supply what the Coalition sees as the missing will in the agency, the courts cannot supply a will that is not present in the legislation. In a major economic and political battle Congress has chosen the path of slow progress. It is not the task of judges to produce a different rate of attainment. The district court properly dismissed the Coalition's suit.

On the assumption that the majority opinion remains the law, I concur in the judgment as to attorney's fees.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Date 1/9/91

Case No. CV88-4414-HLH

COALITION FOR CLEAN AIR ET AL.

v.

ENVIRONMENTAL PROTECTION AGENCY

DOCKET ENTRY

[Entered Jan. 9, 1991]

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

Present:

Hon. HARRY L. HUPP, Judge
MILLI BORGARDING, Deputy Clerk

Attorneys Present for Plaintiffs:

ALAN WALTNER

Attorneys Present for Defendants:

KAREN L. EGBERT, DOJ & Ian Fan, AUSA—for EPA

For Defts-in-Intervention: COLIN LENNARD for SCAQMD; PETER M. GREENWALD for SCAQMD; H. MOSLEY for S.C. Gas Co.; R. LANNEN for S.C. Edison

Proceedings:

EPA'S MOTION TO VACATE SETTLEMENT AGREEMENT AND DISMISS THE COMPLAINT

ORDER (also, if applicable, findings and memorandum opinion):

The motion to vacate the settlement agreement and dismiss the action is granted. The action is dismissed.

The question is whether Congress, in enacting the 1990 amendments to the Clean Air Act (hereafter the "Act"), intended to require that a Federal Implementation Plan (FIP) prepared under the new criteria in the amended Act be promulgated by EPA before there is rejected for non-compliance with the Act by EPA a State Implementation Plan (SIP) hereafter to be prepared under the new criteria and timing schedules in the amended version of the Act.

Under the former version of the Act, the State's plan for the South Coast Air Basin (SCAB) was rejected (*Abramowitz* 9 Cir '87 832 F2d 1071) and EPA acquired the obligation under the former version of the Act to prepare a FIP. Plaintiffs brought this action to compel EPA to prepare the FIP. EPA recognized its obligation to do so, and an agreement

was entered into, approved by the court on March 28, 1989, which set the date for promulgation of the FIP by EPA, since extended to Feb. 28, 1991. In September, 1990, EPA published in the Federal Register its tentative FIP for comment. However, Congress passed extensive amendments to the Act which were signed into law by the President on Nov. 15, 1990. The amendments to the Act change numerous standards which States must meet, set forth new schedules for the submission of SIP's, and continues the provision that if the State fails to submit a plan, or a State SIP is disapproved, the EPA shall prepare an FIP (now, within 2 years of disapproval) or may instead approve a State proposed revision of the SIP (this latter provision is significant because it is clear that California continues to submit significant revisions to its rejected SIP to EPA, including the epochal 1989 plan developed by South Coast Air Quality Management District (SCAQMD)). Thus, the method of enforcement (a federal plan if the state does not come up with an acceptable one) is preserved from the former Act, but EPA has more time, opportunity, and flexibility to develop its own plan or approve State modifications. The difficulty presented by this motion is that Congress did not expressly say whether it intended to start the SIP process over again or not, and it is, therefore, in question whether it is Congress' intent in this circumstance that EPA must follow through on the presently pending FIP, even though the State has not had an opportunity to develop its own plan under the new criteria and schedules.

It must be said that the statute is ambiguous. The court makes this determination not alone from the fact that both EPA and plaintiffs argue that the stat-

ute is crystal clear and unambiguous—their way. Amended § 110 provides in part that:

> "The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator- . . . (B) disapproves a State implementation plan in whole or in part . . .".

Plaintiffs argue that there is no ambiguity here because the EPA disapproved the old SIP in 1988, and that the EPA plainly owes everyone concerned a FIP. What makes the language ambiguous, however, is that the legislation revamped the schedule for submission of SIPs, allowing time in the future to submit the same and plainly assumes that States which did not have approved SIPs, or imposed FIPs, at the date of the amendments to the Act, were to submit them within the new timetables set forth in the Act. The question, then, is which rejected SIP is the revised § 110 now referring to—the one which was rejected in 1988 or the new one which must be submitted under the new criteria and on the new time schedule? The answer is not provided by a reading, literal or otherwise, of § 110. However, the structure of the amended Act, with revamped criteria and timing for SIPs, and with an obvious policy that the States are encouraged to take the lead, with the potential FIP to be the stick that drives them, is clear. There is an additional reason to believe that revised § 110 refers to the new SIP to be prepared by the States under the revised criteria. If the Act were interpreted otherwise, there would be the anomaly that the SIP prepared by the State under the former criteria and rejected is to be replaced by a FIP pre-

pared under the new criteria that the State has never had an opportunity to address. In view of Congressional policy to have States take the lead on preparation of plans, such an interpretation seems less likely than the contrary. From this, it is logical to conclude that the SIP referred to in § 110 is the new SIP required of the States and referred to in other amendments to the Act. The court so concludes.

The court is aided in reaching this result by the usual rule that an administrative agency's interpretation of ambiguous legislation is to be given heavy weight. (*Chevron USA, Inc.* '84 467 US 837, 81 LEd2d 694, 703.)

The Congressional history is inconclusive. Plaintiffs point out that EPA strongly pushed revision of § 110 to make the FIP discretionary, or eliminate the requirement that one be promulgated on State failure, and that Congress expressly declined to adopt the EPA view. This circumstance appears irrelevant to the question posed on this motion to the court. There is no doubt at all that under the amended Act EPA must prepare a FIP on failure of a state to propose one meeting the requirements of the Act, but the question which remains is to what SIP does the Act refer to in imposing this responsibility.

Plaintiffs (joined in this respect by SCAQMD) also argue that the "savings" clause, § 193, preserves the order of this court. That section provides that no "control requirement" in effect before the effective date of the 1990 amendments to the Act is to be modified afterward "unless the modifications insures equivalent or greater emission reductions of such air pollutant". It is apparently argued that the requirement that EPA promulgate a FIP is a "control requirement", or at least there would be requirements

if the FIP were adopted. "Control requirement" is not defined in the Act, but the court thinks that the phrase cannot lend itself to the pending requirement that EPA propose a FIP or to the hypothetical contents of the FIP if one had been adopted before the amendments to the Act, for the reason that there is no present specification of the details of control of various sources of emission control. Thus, it is determined that § 193 does not affect the question at issue. In connection with the interpretation of § 193, the SCAQMD raises some troublesome concerns. SCAQMD notes some severe practical problems which will ensue if EPA does not move forward with a FIP which places limitations on sources of pollution beyond state control and exclusively subject to federal regulation (i.e., ships, aircraft, autos made for sale in the other 49 states, etc., referred to generally as "federal pollution"). It is asserted (without any apparent contradiction) that control of such sources is a prerequisite if the ambient air standards are to be met at all, and that even if the revised SIP presently pending before the EPA is fully implemented, this federal component can only be regulated by EPA. Thus, in SCAQMD's view, a FIP is a necessity even though SIP modifications presently proposed by the State may take care of pollution sources within state control. This concern is troublesome because Congress does not appear to have dealt with it at all. The Congressional plan is to require States to adopt an SIP, and does not appear to recognize, at least in the statute, that Federal controls may also be necessary, although there is a new provision giving EPA permission to issue a partial FIP to fill in the gaps in a state SIP. Presumably, this provision could be used to cover "federal pollution", but § 193 does not re-

quire this type of FIP to be issued at this time, as urged by SCAQMD. The requirement that a FIP be adopted is only triggered by an inadequate SIP. SCAQMD contemplates a coordinated State and Federal plan. It argues that § 193 should be interpreted at least to require EPA to adopt now the necessary Federal part of the plan even though further SIPs may be developed on the delayed schedule allowed by Congress. This view is supported by quotations from Senators Chaffee and Baucus, which assert somewhat ambiguously that § 193 means substantially that. The difficulty is that the statute failed to incorporate anything close to what the senators apparently thought was in the Act. § 110 was left virtually and ambiguously untouched, and the savings clause says nothing about EPA's obligation to adopt a FIP for Federal sources of pollution while letting the states proceed on their revised SIPs.

Senator Baucus was Chairman of the Conference Committee which resolved the differences between the House and Senate versions. His commentary, while apparently not a formal committtee report, thus has somewhat more relevance to Congress' intent than would a stray statement made in floor debate by an individual Senator. He said:

> "We do not intend that this savings clause [§ 193] requires EPA to finalize the state's and regional air quality planning that is ongoing in the Los Angeles area and will otherwise be required under this legislation. If EPA were to promulgate complete new plans based on the requirements of the old Act, the area subject to those federal plans would be deprived of the opportunity to use the

> significantly revised and clearly more workable requirements of the new legislation. We agree that this would be unreasonable, particularly since the proposed FIP fails to recognize the critical role that local governments play in reducing transportation-related emission.
>
> The savings clause provides EPA with significant discretion with respect to FIPs in California. EPA has the obligation to adopt control measures for sources which it exclusively controls [i.e., "federal pollution"] when those controls are necessary to help attain national standards or meet other requirements of the Act but, beyond that, EPA should complete ongoing FIP processes only for the purposes of ensuring that the standards are met by the statutory deadlines."

The statement of Senator Chaffee in answer to the questions of Senator Wilson on the Senate floor was to the same effect. The statement is moderately clear until one comes to the second paragraph. The amended Act does not appear to have told EPA to go ahead and adopt a FIP for "federal pollution" while waiting for the state to finish the revised SIP. The first paragraph makes it clear, however, that the savings clause (and, by implication, § 110) does not require EPA to develop an entire new FIP until the State proposes a revised SIP. SCAQMD suggests that this statement be used to interpret the savings clause as requiring EPA to promulgate a FIP on federal sources of pollution while continuing to work on the State SIP for state sources. The language used, however, is not susceptible to this interpretation, and this approach, even if considered desirable, is not required by the amended Act.

All parties verbally accept the axiom that this court may not make policy. In this they are correct; the court may do only what it believes Congress has authorized or required, even though the parties and it may have other ideas as to what Congress should have done. The court must disregard the occasional and tempting invitations of the parties to construe the legislation to achieve what is believed to be desirable ends. As best the court can interpret the intentions of Congress, the EPA does not now have to proclaim a FIP.

The motion is granted. EPA is to submit forthwith an order vacating the settlement agreement and order and dismissing the action.

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 91-55383
91-55386

COALITION FOR CLEAN AIR; ET AL.,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS-APPELLEES

ORDER

[Filed Sep. 11, 1992]

Before: GOODWIN, NORRIS, and NOONAN, Circuit Judges

Judges Goodwin and Norris have voted to deny the petition for rehearing. Judge Norris has voted to reject the suggestion for a rehearing en banc, and Judge Goodwin has recommended the same. Judge Noonan would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Section 101 of the Clean Air Act, 42 U.S.C. 7401, provides:

(a) Congressional findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration of purpose

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local government actions, consistent with the provisions of this chapter, for pollution prevention.

Section 110(c) of the Clean Air Act, 42 U.S.C. 110(c), provides:

Preparation and publication by Administrator of proposed regulations setting forth implementation plan; parking surcharge; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

> (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 7410(k)(1)(A) of this title, or
>
> (B) disapproves a State implementation plan submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

Section 193 of the Clean Air Act, 42 U.S.C. 7515, provides:

> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this chapter, as in effect before November 15, 1990 shall remain in effect according to its terms, except to the extent otherwise provided under this chapter, inconsistent with any provision of this chapter, or revised by the Administrator. No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990 in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990 in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

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